



**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY**

**CRIMINAL CASE NUMBER 490 OF 2011**

**BETWEEN**

**AZIWELE NKHATA.....PLAINTIFF**

**AND**

**OPPORTUNITY BANK OF MALAWI.....1<sup>ST</sup> DEFENDANT**

**AISILE AMBELE.....2<sup>ND</sup> DEFENDANT**

**CORAM : MWALE, J.**

Chimango-Phiri, of Counsel for the Plaintiff

Kubwalo, of Counsel for the Defendant

Kaferaanthu, Court Interpreter

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**Mwale, J**

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**JUDGMENT**

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**Background and Facts**

1. The plaintiff brought this matter by way of Originating Summons for Consequential and Orders and Declaratory Judgment consequent to a prior decision on an Originating Summons for Summary Possession of land that was decided on 23<sup>rd</sup> July 2012 by the Master. The subject matter of both summons is land situate at Mponela Trading Centre in Dowa District held by the plaintiff under an indenture of lease registered under title deed

number 7691. The first defendant is a bank which has defended itself throughout the process, whilst the second defendant has remained conspicuously silent throughout the proceedings.

2. The facts that gave rise to the dispute emanated from a loan that was secured by way of bill of sale against the land in question by the plaintiff's second wife in the sum of MK1,500,000.00 from the first defendant. Upon default, the first defendant enforced the bill of sale and sold the land to the second defendant. The Master in his order for summary possession in the matter found that the first defendant could not have used the land in question as security. He further concluded that the first defendant could not have validly sold the land to the second defendant who did not have the plaintiff's permission to enter the land. He therefore ordered the plaintiff to recover possession of the land within 30 days of the order on 23<sup>rd</sup> July 2012. The plaintiff was also awarded costs.
3. On 25<sup>th</sup> September 2012, the plaintiff filed the current Originating Summons for Consequential Orders and Declaratory Judgment using their lawyers at that time, Messrs Maulidi and Company. What followed after the filing of the current Originating Summons was a long drawn out of process with various twists and turns along the way. To begin with, the defendants failed to file process in response to the summons and although the plaintiff originally filed for default judgment, they withdrew the application by virtue of a Consent Order dated 2<sup>nd</sup> July 2013.
4. The terms of the Consent Order were that the Notice of Application for Judgment in Default would be withdrawn and the first defendant would acknowledge service of the originating summons and file an affidavit in opposition to the originating summons within 14 days. Although the plaintiffs have argued in the current summons that the terms were not complied with, there is evidence on record that an Affidavit in Opposition to the Originating Summons was served on the plaintiff within the stated time as it was served on 11<sup>th</sup> July 2013. Notwithstanding this, the plaintiff filed for and the Court issued a Certificate on Non-Compliance against the defendant on 8<sup>th</sup> October 2013. It was based on the misrepresentation to the court that the defendant had never replied to the Originating

Summons that Muhara, J. on 24<sup>th</sup> May 2016 granted a Final Order as Declaratory Judgment and Directions in favour of the plaintiff. The first defendant then proceeded to apply to the same court for an Order to set aside the Declaratory Judgment which the judge granted on 7<sup>th</sup> June 2017 on account of having been misled.

5. Thereafter, the plaintiff took no action for an entire year until 19<sup>th</sup> February 2015 when he eventually filed a Notice of Intention to Proceed After a Year's Delay under Order 3 Rule 6 of the Rules of the Supreme Court. When proceeding, the plaintiff instructed Messrs Handry Law Chambers to prosecute the Originating Summons for Consequential Orders and for Declaratory Judgment. When the matter came before this Court for the hearing of the said summons, I directed as follows:

- (a) that the defendant file skeleton arguments within three days; and
- (b) that the plaintiff reply within two days.

Thereafter the matter would be set down. Upon the expiry of the said three days, the first defendant had not filed their skeleton arguments and the plaintiff proceeded to file Supplementary Skeleton Arguments addressing issues raised by the defendant in their affidavit in opposition.

### **The Plaintiff's Claim**

6. According to the Originating Summons, the plaintiff is seeking reliefs that I have summarized as follows:
  - (a) A declaration that the defendant unlawfully entered the plaintiff's shops committing an act of trespass.
  - (b) A declaration that the defendant unlawfully removed from the said property trading goods all valued at MK5,000,000.00 and converted the same to its own use.
  - (c) A declaration that the plaintiff is entitled general damages for trespass to the plaintiff's shops, and special damages for loss of trading goods and loss of business and profit, to be assessed by the Court.

The plaintiff is also seeking any other relief that the Court may deem fit as well as costs.

## **The Defence**

7. According to the first defendant's Affidavit in Opposition, the Court is to dismiss the Originating Summons in its entirety with costs for a number of reasons. To begin with, they argue that the issue of trespass to land was already pleaded and dealt with by the court in the originating summons for summary possession of land. Since the plaintiff repossessed the land by court order, it is counsel for the first defendant's view that the matter was closed and the plaintiff already received costs for the same. The first defendant thus concludes by arguing that the issue of damages is therefore *res judicata*, frivolous, vexatious and an abuse of the court process.

## **Court's Reasoned Determination**

### **(a) Originating Summons Process**

8. The proceedings before me must, in consequence to the recent amendment to the Court's Act, be read to have been instituted pursuant to the powers that were formally citable as Order 7 as read with 28 and 15 Rule 16 of the Rules of the Supreme Court. As alluded to earlier, the specific form of action that I am dealing with is an Originating Summons for Consequential Orders and Declaratory orders. An analysis of this type of originating process is the starting point in determining this matter. Originating summons is a process used for either proceedings under any Act (see order 5 Rule 3 of the Rules of the Supreme Court), or for proceedings:
  - (a) in which the sole question at issue is or likely to be construction of an Act or any instrument made under an Act; or
  - (b) in which there is unlikely to be substantial dispute of fact.

The current application is not based on the construction of any statute but seeks the determination of the court on questions of fact and also seeks relief in consequence. The determinations that the plaintiff seeks this CVourt to make by way of declaratory judgment are that the defendants trespassed on his property and took possession of, as well as sold the same without his consent and authority. In so doing, the first defendant removed the plaintiffs trading goods valued at MK5,000,000.00 which he is claiming for as special

damages. He is also seeking general damages for trespass and loss of business and profit. This type of claim, in my view, is not appropriate for the originating summons procedure. Whether the first defendant caused damage in breaking into the said premises and subsequently unlawfully removed goods valued at MK5,000,000.00 which it converted to its own use, is a contentious issue of fact that must be proved by evidence. It is not enough for the plaintiff to show that he succeeded on his originating summons for possession of land because all that these earlier proceedings show is that the plaintiff's land was unlawfully occupied and an order for its return to the plaintiff was made. There has been no evidence for any of the general damages or special damages claimed in order for a court to grant them. I therefore reiterate that the current claim is not appropriately commenced by originating summons.

**(b) Declaratory Judgment**

9. Counsel for the plaintiff has argued that he could not have sought the remedies claimed herein under the Originating Summons for Summary Possession of Land which was granted in his favour. This is because under Order 113 Rule 1 of the Rules of the Supreme Court no other relief or remedy can be claimed in such proceedings. The plaintiff was thus precluded in the initial action from claiming for damages and seeks to do so now by way of declaratory judgment and consequential reliefs.
10. In order to properly set the current process in context, the logical starting pointing is to define declaratory relief. The authors of "The Declaratory Judgment" (4<sup>th</sup> Ed, Sweet and Maxwell, 2011) (Woolf and Woolf eds.) define it as follows:

A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order and then order the defendant to act in a certain way... a declaratory judgment, on the other hand pronounces upon a legal relationship but does not contain any order which be enforced against the defendant.

H.W.R. Wade in “Administrative Law” 5<sup>th</sup> Edition at page 523 also stated as follows in reference to a declaratory judgment:

A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court. By enabling a party to discover what his legal position, it opens the way to the use of other remedies to give effect to it, if that should be necessary.

It is clear from these definitions that a declaratory judgment is very limited in its powers. All it can do is clarify a legal relationship or state of affairs by stating the court’s opinion of it. In other words, it states the court’s authoritative opinion regarding the exact nature of the legal matter without requiring the parties to do anything. I have also taken great effort to familiarize myself with the requirements that are required at law for the satisfaction of the court before it can grant declaratory relief. A number of conditions must be met and some of these were set out by the Singapore Court of Appeal in the case of *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and Another* [2006] 1 SLR (R) 112 as follows:

- (a) The court must have jurisdiction and power to award the remedy.
- (b) The matter must be justiciable in the court.
- (c) As a declaration is a discretionary remedy, it must be justified by the circumstances of the case.
- (d) The plaintiff must have *locus standi* to bring the suit and **there must be a real controversy for the court to resolve.**
- (e) Any person whose interests might be affected by the declaration should be before the court; and
- (f) **There must be some ambiguity about the issue in respect of which the declaration is asked for so that the court’s determination would have the effects of laying such doubts to rest.** [Emphasis supplied].

I have highlighted the conditions that are not satisfied in the present case. I see no legal controversy or ambiguity in this matter for the court to settle other than a claim that must be proved on its facts. As I have reasoned above such a claim is not amenable to the originating summons process, and from what I have reasoned above, nor is amenable to a grant of declaratory relief.

What the plaintiff is seeking here is executory relief and he must therefore file suitable process for that purpose.

**(c) Consequential Relief**

11. Order 15 Rule 16 of the Rules of the Supreme Court which provides for declaratory judgment, states as follows:

No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any **consequential relief** is or could be claimed (emphasis supplied).

What this rule means, is simply that a suit shall not be open to objection because a declaratory judgement or order is sought by the suit and the court may make binding declarations of right whether consequential relief has been claimed or could be claimed or not. As a declaratory judgment is not executory, it may be made in conjunction with an order for consequential relief since “...the claim for a declaration is not in itself a claim for relief...” (per ***Bankes LJ in Guaranty Trust of New York v Hannay and Co*** [1915] 2 KB 536 at 474). Based on the nature of declaratory judgments, the rule does not extend the declaratory judgment form to the claim of executory consequential reliefs that the plaintiff is claiming. The consequential relief sought in an action for a declaratory judgment must correspond to the action in which the court is determining certain legal rights. The consequential reliefs that the plaintiff is seeking in this case can only be in consequence to an action capable of executory relief. I therefore reiterate my finding that both the originating summons and the declaratory judgment summons have been misused based on the facts and issues in contention in this case. I am therefore dismissing the summons with costs to the first defendant.

I so order.

Made in chambers this 26<sup>th</sup> day of May 2017 in Lilongwe in the Republic of Malawi.

F. MWALE  
JUDGE